signal will use only 3 MHz of cable capacity? Because the burden imposed by digital carriage is significantly less – indeed only half – of the burden imposed and approved in the Turner cases, the constitutionality of a mandatory carriage of digital signals follows *a fortiori*.

The Tribe Report's only response is to protest that the Supreme Court "did not grant broadcasters a permanent easement or other property right of 6 MHz of space on cable systems." Tribe Report at 7. But that is beside the point – the broadcasters do not claim that the Court bestowed any such property right; instead Congress gave broadcasters the right to swap their 6 MHz of analog spectrum for digital spectrum. The key point is that the digital signals carried over the spectrum Congress provided to broadcasters uses less cable capacity than the analog signals at issue in the Turner cases, and thus the Turner cases foreclose any First Amendment challenge.

Third, as a relative matter, the burden to be imposed by mandatory carriage of digital signals is significantly less than the burden approved in the Turner cases, because cable capacity has increased exponentially, while broadcast stations have not (and even if they had, the statute imposes a one-third cap on the stations to be carried); indeed, even carriage of both the analog and the digital signals will use less capacity as a percent of total cable capacity than did analog must carry at the time the Court decided the Turner cases. The Tribe Report seeks to avoid these dispositive facts by suggesting that the constitutional analysis "does not depend on the precise number of stations that cable systems are technologically able to carry at any given moment in time," because "any

---

[5] See Reply Comments of NAB/MSTV/ALTV at 18 (Aug. 16, 2001), submitted in In re Carriage of Digital Television Broadcast Signals, CS Docket Nos. 98-120, 00-96, 00-2 ("Reply Comments of NAB/MSTV/ALTV").

interference with cable operators' discretion creates a First Amendment issue." Tribe Report at 5 (emphasis in original). But Turner II forecloses this argument, as the Court undertook a detailed analysis of the percentage of cable capacity devoted to mandatory camage. See Turner II, 520 U.S. at 214; see also 520 U.S. at 228 (Breyer, J., concurring) ("I agree further that the burden the statute imposes upon the cable system, potential cable programmers, and cable viewers is limited and will diminish as typical cable system capacity grows over time").

The Tribe Report retreats then to the proposition that predictions about cable's usable capacity "are hazardous at best." Tribe Report at 6. But the evidence is to the contrary. Indeed, the Tribe Report's assertion ignores and contradicts the cable operators' own statements to the FCC and the SEC describing the rapid expansion in cable capacity! Few predictions in this industry are as safe as the prediction that cable capacity will continue to expand, and that the relative burden of mandatory camage of the entire digital broadcast signal will continue to rapidly decrease.

Finally, the Tribe Report suggests that there will be no surplus capacity because any such capacity will go to provide services such as "high speed Internet services'' and telephony. Tribe Report at 6. But whatever the First Amendment implications of limiting the capacity that cable operators may devote to their own programming choices, there are surely no First Amendment implications in limiting the capacity that cable operators may devote to their Internet services and telephony, businesses that do not

---

[6] *See.* e.g., Comments of NAB/MSTV/ALTV at 31-32 (June 11, 2001), submitted in In re Carriage of Digital Television Broadcast Signals, CS Docket Nos. 98-120, 00-96, 00-2; Reply Comments of NAB/MSTV/ALTV at 6-8.

implicate the editorial discretion the First Amendment protects. See. e.g., Reply Comments of NAB/MSTV/ALTV at 35-36.

II. The Requirement That Cable Operators Carry the Entirety of the Free Over-The-Air Signals Advances Both the Interests Approved by the Court in the Turner cases and the Government's Interest in a Rapid Transition.

The Tribe Report also suggests that a requirement that cable operators cany the entire broadcast signal fails to advance the interests that Congress set forth and that the Court approved in the Turner cases. That analysis is wrong.

In the 1992 Cable Act, Congress made "unusually detailed statutory fmdings" regarding the ability and incentive of cable operators to refuse carriage of the signals of many broadcasters, as well as the harm resulting from that refusal. Turner I, 512 U.S. at 646. Congress found that "because cable systems and broadcast stations compete for local advertising revenue," and "because cable operators have a vested financial interest in favoring their affiliated programmers over broadcast stations," cable operators have an "economic incentive . . . to delete, reposition, or not carry local broadcast signals." Id. Congress concluded that "absent a requirement that cable systems cany the signals of local broadcast stations, the continued availability of free local broadcast television would be threatened." Id. Congress passed the 1992 Act to reduce the threat to broadcasters arising from cable operators' discriminatory conduct because "[t]here is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming." Id. (internal quotation omitted). Justice Breyer succinctly noted in Turner II that "without the statute, cable systems would likely carry significantly

fewer over-the-air stations, that station revenues would decline, and that the quality of over-the-air programming would suffer." 520 U.S. at 228 (Breyer, J., concurring).

By narrowly construing the term "primary video" to exclude from carriage all but one free, video programming stream, the Commission has facilitated precisely the dangers that Congress sought to avoid in the 1992 Act. Cable operators continue to "compete for local advertising revenue" and have "a vested financial interest in favoring their affiliated programmers over broadcast stations," and they thus retain an "economic incentive . . . to delete, reposition, or not carry local broadcast signals." Under the interpretation of primary video advanced by the cable operators and adopted by the Commission, the cable operators will now have the power to refuse carriage of multiple streams of broadcast material.

The consequences of this Commission action are severe. By giving cable operators control over the ability of a broadcaster to realize a return on investment in multiple program streams, the Commission has created a powerful disincentive for broadcasters to invest *the* huge sums needed to develop multiple streams of locally-oriented programming or innovative video services. As a result, cable subscribers and non-subscribers alike will be deprived of the full benefits that digital technology enables, including programming selected to reflect the tastes and needs of their local communities. That result is particularly unfortunate in light of Congress' express recognition in Section 336 of the Communications Act of the value of innovative digital services and multiple broadcast streams for broadcasters and viewers alike. See Section 336 (directing the Commission to provide "Broadcast Spectrum Flexibility" with respect to licenses for advanced television services.)

The long-term effect of the Commission's decisions is even more severe. Broadcasters deprived of the ability to take advantage of the full economic opportunity that digital technology offers will face a substantial disadvantage in competition for critical advertising revenue. The Commission's decision thus threatens to undermine the viability of local broadcast stations in the digital age, leading to precisely the decline in the quality and diversity in over-the-air programming that Congress sought to forestall.[7]

The Tribe Report contends nevertheless that a more restrictive interpretation of primary video is necessary to satisfy the First Amendment. The report suggests, for example, that camage of one of a broadcaster's multiple streams and services "would seem fully to satisfy the governmental interest in preserving the benefits of free broadcast television." Tribe Report at 8. But, as noted, the inevitable result of the Commission's narrow construction of the term "primary video" to exclude from carriage all but one free, video programming stream creates a powerful disincentive for broadcasters to develop multiple streams of locally-oriented programming or innovative video services. Those viewers who receive their programming exclusively from over-the-air television,

[7] To show that the **less** restrictive interpretation of primary video is constitutional, the broadcasters need not demonstrate that the interpretation offered by the cable operators would cause "a complete disappearance of broadcast television nationwide." Turner II, 520 **U.S.** at 191. Instead, it is sufficient to show that the multiple programming streams of "'significant numbers of broadcast stations will be refused camage of cable systems,"' and those "broadcast stations will either deteriorate to a substantial degree or fail altogether."' Id. at 191-92 (quoting Turner I, 512 U.S. at ***666).*** NCTA's response to Chairman Powell's voluntary plan for advancing the digital transition, in which cable operators refused to commit to camage of any enhancements to digital signals other than High Definition Television, provides ample factual support for a conclusion that cable operators will use their gatekeeper facilities to prevent innovative broadcast digital services from reaching an audience. See Letter from Robert Sachs, President and CEO of NCTA, to Chairman Michael Powell (May 1,2002).

as well as cable subscribers themselves, would thus be deprived of the full benefits that digital technology offers for free broadcast television.

Moreover, it is precisely the ability to offer multiple streams of programming and innovative services that makes digital television so attractive. The inability to obtain carriage in a digital world for the full panoply of programming and services could have a devastating impact on broadcasters, with a corresponding impact on viewers who rely on those broadcasters for their programming.'

The Tribe Report next suggests that camage of multiple video streams would not be narrowly tailored to the interest in promoting information from a multiplicity of sources because affording the same broadcaster camage for multiple broadcast streams does not increase programming from a multiplicity of sources. Tribe Report at 9. But, again, that argument is doubly mistaken. First, carriage of multiple broadcast streams of the same broadcaster does provide additional diversity, as it allows broadcasters the flexibility to use their multiple streams to provide innovative services that cable programmers may not be currently providing and that would not otherwise be available in a single stream broadcast. More important, the ability to offer the full range of services available over digital programming and to have access to the cable audience is essential to the survival of some broadcasters in a digital world, which is in turn the critical element Congress identified in preserving the "widespread dissemination of information from a multiplicity of sources."

---

[8] The Tribe Report's citation to Fox Television Stations. Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002), is bewildering. Fox recognized that camage rules are essential to preventing discrimination by cable operators. The potential for such discrimination will only increase in a digital world.

Similarly meritless is the ipse dixit in the Tribe Report that ensuring carriage of the entire multicasting stream "would not appear to be narrowly tailored to any interest in 'promoting fair competition,' because "[o]nce a broadcaster is assured that its primary programming stream will be carried, any governmental interest in 'fair competition' is fully satisfied." Tribe Report at 10. But, again, effective competition is impossible if the bottleneck cable operators have the ability to deny their direct competitors – the broadcasters – access to two-thirds of the potential audience for the most valuable and innovative of services and programming. That is all the more the case given the substantial investment that the transition to digital and the development of innovative services requires.'

Although the interests identified and approved in the Turner cases are more than sufficient to justify a more expansive reading of "primary video," such a reading also serves the government's important interest in ensuring a rapid transition to digital. The

---

[9] Nor is there any basis for the assertion in the Tribe Report that a "majority of the Court rejected" promoting fair competition as an important government interest. In fact, four Justices squarely embraced the proposition that promoting fair competition was an important government interest, and Justice Breyer did not reach the question because he found the 1992 Act constitutional "whether or not the statute does or does not sensibly compensate for some significant market defect." 520 U.S at *226* (Breyer, J., concurring). In addition, the Tribe Report understates the extent to which a majority of the Court – and Justice Breyer in particular – found troubling the incentive and ability of cable operators to use their monopoly power to disfavor broadcasters. Indeed, Justice Breyer expressly agreed that a cable system "constitutes a kind of bottleneck that controls the range of viewer choice," and that "without the [must-carry] statute, cable systems would likely cany significantly fewer over-the-air stations, that station revenues would therefore decline, and that the quality of over-the-air programming on such stations would almost inevitably suffer." Id. at 228 (Breyer, J., concurring). That is exactly the kind of discrimination against broadcasters that will occur in the absence of a proper definition of primary video: cable operators will refuse carriage of the all but one of the broadcasters streams, and the station revenues of broadcasters and the quality of over-the-air programming on such stations will decline.

Tribe Report asks the Commission to turn a blind eye to that interest on the ground that "the Commission may not manufacture post hoc rationalizations for its must-carry rules" without effectively converting First Amendment analysis into "mere rationality review." Tribe Report at 10.

At the outset, the Tribe Report is mistaken because the importance of and need for a rapid transition are reflected in the 1992 Cable Act itself. Section 614(b)(4)(B), for example, expressly directs the Commission to revise its carriage rules to accommodate "advanced television."

In any event, case law from the Supreme Court and the D.C. Circuit demonstrates that the Commission has the power to provide what the Tribe Report misleadingly refers to as "post hoc rationalizations" in the normal course of promulgating statutorily authorized rules, and that the courts will examine justifications raised both by Congress and by agencies. This is especially the case in the context of regulation enacted pursuant to the Communications Act, an area in which "the physical scarcity of broadcast frequencies, as well as problems of interference between broadcast signals, led Congress to delegate broad authority to the Commission to allocate broadcast licenses in the 'public interest."' FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 795 (1978). Congress's broad statutory grant has led the Court to permit the Commission to weigh carefully First Amendment interests when deciding how to enforce and implement the Communications Act. &National Citizens Committee, 436 U.S. at 795-97 (permitting the Commission to rely on its "judgment" and "experience" to make "change[s] in policy [that are] reasonable administrative response[s] to changed circumstances in the broadcasting industry"); see also Columbia Broadcasting System,

Inc. v. Democratic National Committee, 412 U.S. 94, 122 (1973). Indeed, here, Congress expressly directed the Commission to address issues relating to "advanced television" when it passed Section 614(b)(4)(B).

The Tribe Report's argument to the contrary confuses a court's conceded lack of power to hypothesize rationales that the government did not offer with the previously undisputed power of an agency – particularly an agency that plays the critical expert role the Commission plays in the administration of the Communications Act in general and in the 1992 Cable Act in particular – to describe the important government interests that its actions are intended to advance. See, e.g., FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143-44 (1940) ("But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, conrts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.").

Ultimately, "intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed." City of Erie v. Pap's A.M., 529 U.S. 277, 313 (2000). The Commission thus can and should justify its actions to aid in judicial review of the Commission's actions.

Unsurprisingly, none of the three cases cited in the Tribe Report supports a contrary conclusion. Tribe Report at 10. Edenfield v. Fane found that, unlike rational

basis review, First Amendment scrutiny does not allow courts "to supplant the precise interests put forward by the State with other suppositions." Edenfield, 507 U.S. 761, 768 (1993). Edenfield says nothing of the Commission's power to offer justifications for the rules it promulgates in response to statutory grants of authority. Board of Trustees of State University of New York v. Fox only requires "the government goal to be substantial, and the cost to be carefully calculated." Fox, 492 U.S. 469, 480 (1989). Fox thus does little to support the contention that the Commission may not adopt its own justifications for rules and statutory interpretations needed to address changes in circumstances. Finally, the Tribe Report cites First National Bank of Boston v. Bellotti, 435 U.S. 765,785-90 (1978); but Bellotti exclusively examined the constitutionality of a legislative enactment and said nothing about the Commission's power to rationalize its own interpretations of statutory mandates. In short, the interest in ensuring a rapid transition to digital provides additional grounds for rejecting the cable operators' First Amendment arguments.

Finally, turning from a discussion of the particular interests to be advanced by the primary video provision, the Tribe Report emphasizes that any carriage requirement imposes significant First Amendment burdens on cable operators. Tribe Report at 3-5. But that is an argument not against primary video, but against must cany itself, which the Court already upheld in the Turner cases. The cable operators' effort to reargue the Turner cases before the Commission must be rejected.

In any event, the Tribe Report ignores that "there are important First Amendment interests on the other side as well." Turner II, 520 U.S. at 226 (Breyer, J., concurring). As the Court emphasized in Turner I, "assuring that the public has access to a multiplicity

of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." Turner I, 512 U.S. at 663. Indeed, the ''widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," Turner I, 512 U.S. at 663 (internal quotation omitted), because it "facilitate[s] the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve." Turner II, 520 U.S. at 226 (Breyer, J., concurring). The Court in the Turner cases balanced the First Amendment interests at stake and held that a requirement that cable operators carry each broadcaster's full 6 MHz signal up to the statutory cap did not violate the First Amendment. The same result is required here.

III. The Just Compensation Clause Provides No Basis for a Restrictive Interpretation of Primary Video.

The Tribe Report concludes by arguing that the Commission should avoid an expansive interpretation of the primary video carriage obligation because such an interpretation would present "serious questions'' under the Just Compensation Clause of the Fifth Amendment, as defmed by Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Tribe Report at 12. But the Loretto arguments contained in the Tribe Report offer no justification for adopting a narrow view of the primary video obligation.

At the outset, the mere existence of "serious questions" regarding the Just Compensation Clause provides no basis for reading a statute narrowly. As the Supreme Court has made clear, constrning a statute to avoid a possible takings challenge "does not constitute avoidance of a constitutional difficulty; it merely frustrates permissible

applications of a statute or regulation." United States v. Riverside Bayview Homes. Inc., 474 U.S. 121, 128 (1985) (internal citation omitted).

Avoidance is particularly inappropriate here as a means to justify a narrow rather than a broad interpretation of primary video, because the Just Compensation Clause treats both interpretations the same. Even the cable operators do not attempt to draw a constitutional line between a broad and a narrow reading of the "primary video" carriage obligation. Tribe Report at 12-15. Nor could that line be drawn, for such a distinction would turn on the quantity **of** property allegedly taken, and "constitutional protection for the rights of private property cannot be made to depend on the ***size*** of the area permanently occupied." Loretto, 458 U.S. at 437. Nor is it an answer to claim that **a** broad primary video interpretation would "commandeer an additional five channels per broadcaster." Tribe Report at 14. For if requiring cable operators to carry channels of broadcast signals indeed takes "private property for public use" without compensation, then the requirement is unconstitutional regardless of whether **the** cable companies must accommodate one, five, or one hundred channels. In any event, as demonstrated above, carriage of a single digital broadcasting stream **uses** the same cable capacity as carriage of multiple broadcasting streams, and thus the takings analysis is the same for both. Whatever **else** may be true about the takings analysis, it cannot be used as a basis to distinguish between the competing primary video interpretations."

---

[10] In the challenge to the Commission's analog must cany rules that were at issue in the Turner cases, the cable operators raised and then abandoned a takings challenge to the Commission's **rules.** Given that the Just Compensation Clause provides no basis for treating mandatory carriage of the entire analog signal differently from mandatory camage of the entire digital signal, basic principles of **res** iudicata counsel strongly against the Commission's relying on a takings argument at this stage in the implementation of the 1992 Act.

Moreover, Congress has already heard and rejected arguments that mandatory carriage constitutes a taking, concluding that "[t]he reestablishment of signal carriage requirements will not, therefore, result in any unconstitutional taking of cable operators' property without compensation." H. Rep. No. 102-628 at 67. The Tribe Report's suggestion that separation of powers concerns and deference to Congress somehow supports the cable operators' position, Tribe Report at 16-18, is mistaken. To the contrary, to credit takings arguments that Congress has expressly rejected is an affront to congressional decisionmaking and a breach of the Commission's paramount duty to discern and follow congressional intent. See Building Owners & Managers Assoc. Int'l v. FCC, 254 F.3d 89, 102-03 (D.C. Cir. 2001) (Randolph, J., concurring) ("Since the political branches have made a legislative choice to accept federal liability for takings, the federal courts must respect that determination.")."

In any event, the Loretto arguments advanced by the cable companies present no serious issues regarding the proper interpretation of primary video. In Loretto, the Supreme Court held that a "permanent physical occupation of real property" presumptively constitutes a taking requiring "just compensation." 458 U.S. at 427-28.

[11] Congress has, of course, provided a mechanism through the Tucker Act to compensate cable operators should Congress' confidence in the absence of any viable takings challenge prove misplaced. Building Owners, 254 F.3d at 102-03 (Randolph, J., concurring) ("By passing the Tucker Act, Congress generally bound itself to paying for authorized takings by the federal government, regardless whether the specific liability in any particular case was intended or foreseen."). Given that Congress has set up a clear scheme for compensating those who suffer from regulatory takings, the Commission should not hesitate to discharge its statutory responsibilities. As the Conrt in Riverside explained "the possibility that the application of a regulatory program may in some instances result in the taking of . . . property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred." 474 U.S. at 128.

The Court refused, however, to "question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property." Id. at 441. Loretto thus on its face demonstrates the most significant difficulty with any attempt to fit must-carry obligations into the Loretto framework carriage requirements in no way resemble the type of "permanent physical occupations of real property" subject to Loretto's per se rule. In Loretto, the Court characterized the injury to the plaintiff as "a special kind of injury [because] a stranger directly invades and occupies the owner's property." Loretto, 458 U.S. at 436 (emphasis added). The Court stressed that "such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imnoses affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion." Id. (emphasis added). A requirement that cable operators carry even many different channels of a divided digital spectrum merely regulates the manner in which cable companies allocate and employ their cable lines. Unlike the condemnation of real property – such as a farmer's crops, see Tribe Report at 14 – carriage obligations do not give dominion or ownership rights over the real property (cable lines) to the government or to third parties. See Loretto, 458 U.S. at 440 n.19 (distinguishing landlord-tenant regulations from permanent physical occupations on the basis of ownership distinctions). The cable operators are not complaining, for example, that a broad interpretation of the primary video rule would permit broadcasters to install additional equipment on the cable operators' property or would require moving or making modifications to or seizing control of the operators' lines.

Control over the physical property in question is central to any Loretto inquiry. The Court explained that the appellant's injury "might have been obviated if she had owned the cable and could exercise control over its installation." Loretto, 458 U.S. at 440 n.19. Even under the most broad interpretation of "primary video," cable companies would continue to exercise exclusive control over the affected physical property. A broad interpretation thus avoids "a permanent physical occupation of [] property of the kind that [the Court] ha[s] viewed as a per se taking." Eastern Enterprises v. Apfel, 524 U.S. 498, 530 (1998); see also Yee v. Citv of Escondito, 503 U.S. 519, 532 (1992) (rejecting takings claim because the challenged government action "is a regulation of petitioners' use of their property and thus does not amount to a s t a k i n g ") . "

The difficulty of conceptualizing how must-carry obligations physically occupy any real property is ample evidence in itself that Loretto does not apply. The Loretto Court explained that "whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." Loretto, 458 U.S. at 437; *see* also Tahoe-Sierra Preservation Council. Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465, 1478 n.17 (2002) ("When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or

---

[12] The Cable Act, like the Coal Act at issue in Apfel, "does not appropriate, transfer, or encumber an estate in land (*e.g.,* a lien on a particular piece of property), a valuable interest in an intangible (*e.g.,* intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act . . . ." Apfel, 524 U.S. at 541 (Kennedy, J., concurring in part and dissenting in part). As Justice Kennedy noted in Apfel, "To call this sort of governmental action a taking as a matter of constitutional interpretation is both imprecise and, with all due respect, unwise." Id.

regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.").

Moreover, acceptance of the expansive takings analysis offered by the cable operators would belie the Court's own admonition in Loretto that "[o]ur holding today is very narrow." 458 U.S. at 441; see also FCC v. Gulf Power Corn., 480 U.S. 245, 251 (1987). Indeed, the Supreme Court and the Courts of Appeals have consistently rejected attempts to expand the Loretto notion of a permanent physical occupation of property. See. e.g., United States v. Sperry, 493 U.S. 52, 62 n.9 (1989) (deduction from monetary award); United States v. 0.59 Acres of Land, 109 F.3d 1493, 1497 (9th Cir. 1997) (refusing to extend Loretto to occupation by electromagnetic fields generated by power lines); Samaad v. City of Dallas, 940 F.2d 925, 938 (5th Cir. 1991) (noise from adjacent property is not a Loretto taking).

Were the Commission to follow the advice of the cable operators, a wide range of congressional and Commission regulatory requirements would come under attack. For example, the leased access provisions and the PEG provisions of the Communications Act would be immediately subject to attack, as would the analog must-carry provisions the Supreme Court upheld in Turner II. See 520 U.S. at 224-25. Indeed, even outside of broadcasting, accepting the arguments in the Tribe Report would subject a host of Commission regulations, including common carriage itself, to a Loretto analysis. The primary video provisions would be just the tip of the iceberg."

---

[13] Indeed, the result would he breathtaking. The Supreme Court has never applied a Loretto analysis either to common carriage requirements or to the regulatory requirements such as the interconnection, access to unbundled elements, and resale obligations that provide the critical foundations for the Telecommunications Act of 1996.

Nothing in the Tribe Report compels such a radical reworking of takings jurisprudence. The Tribe Report cites, for example, Justice O'Connor's dissent in Turner I to support the proposition that "a common carriage obligation for 'some' of a cable system's channels would raise substantial Takings Clause questions." Tribe Report, at 14 (citing Turner I, 512 U.S. at 684 (O'Connor, J, concurring in part and dissenting in part). But that is disingenuous. Justice O'Connor wrote: "Congress might also conceivably obligate cable operators to act as common carriers for some of their channels, with those channels being open to all through some sort of lottery system of time-sharing arrangement. Setting aside any possible Takings Clause issues, it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies . . . ." Id. at 684. That off-hand reference to "possible Takings Clause issues" implicated under a different statutory scheme can hardly be a basis for asserting "substantial questions" for a Commission charged with the responsibility of implementing the mandates of congressional statutes.

The Tribe Report's analogies to business property condemnation cases, see Tribe Report at 15, are similarly inapposite. Must-carry obligations do not condemn "business property with the intention of carrying on the business." See Kimball Laundry v. United States, 338 U.S. 1, 12 (1949) (cited in Tribe Report at 15). Kimball, a classic example of a business condemnation case, provides an apt contrast to the regulatory character of

---

See 47 U.S.C. 251(c). For more than a century, and as reaffied this past Term in Verizon v. FCC, 122 S. Ct. 1646 (2002), takings claims have been governed by the deferential approach epitomized by FPC v. Hope Natural Gas, 320 U.S. 591 (1944). The approach put forth by the Tribe Report would subject these obligations to a Loretto analysis, overturning this century of jurispudence and undermining the foundations of the Commission's regulation of telecommunications.

mandatory carriage obligations. In Kimball, the Army took over a private laundry plant and ran it exclusively as "a laundry for personnel in the Seventh Service Command." 338 U.S. at 3. The defining aspect of the taking in Kimball was the complete and unambiguous takeover of the plant by the government. See id. at 14; see also Tahoe-Sierra Preservation Council, 122 S. Ct. at 1479 n.18 (discussing similar distinctions with respect to other wartime takings cases). As noted above, mandatory carriage obligations in contrast do not condemn the physical lines owned by cable companies.

Bell Atlantic Teleuhone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), is not to the contrary and, indeed, forecloses the cable operators' Loretto claim. In Bell Atlantic, petitioners challenged Commission rules that permitted both "physical co-location" (in which the equipment of a Competing Access Provider ("CAP") is placed in the central office of a Local Exchange Carrier ("LEC")) and "virtual co-location" (in which the LEC "owns and maintains the circuit terminating equipment, but the CAP designates the type of equipment that the LEC must use and strings its own cable to a point of interconnection"). 24 F.3d at 1444. The D.C. Circuit applied Loretto to the "physical co-location" only, declining to apply physical occupation doctrine to the Commission's virtual co-location rules. The broad interpretation of primary video carriage obligations would create an even less intrusive "taking" than the virtual co-location rules did. Unlike the virtual co-location rules, under which a CAP "designates the type of equipment that the LEC must use," Bell Atlantic, 24 F.3d at 1444, a broad primary video interpretation would not give broadcasters any authority over the type of equipment cable companies could use.

At most, then, must-carry regulations unexceptionally deprive cable companies of unfettered use of corporate assets in order to provide minimal public access to broadcasters – an action befitting the label "regulatory taking," Tahoe-Sierra Preservation Council, 122 S. Ct at 1481, and triggering only a deferential and "fact specific inquiry" under Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). See Tahoe-Sierra Preservation Council, 122 S. Ct at 1481, 1484. Under that inquiry, the Court "examine[s] 'a number of factors' rather than a simple 'mathematically precise' formula"' Id. at 1481. Significantly, the cable operators have not even tried to make out a case that any interpretation of primary video would result in a taking under the Penn Central analysis. And with good reason, for there is simply no taking under Penn Central.

As noted above, because the burdens on cable operators are the same whether those operators are carrying a single broadcast digital stream or multiple such streams, the decision to mandate carriage of the entire signal has no constitutional significance under the Penn Central or any other analysis. But even taking the cable operators' claims more broadly, Penn Central affords no relief. The core of that fact-specific inquiry involves three factors: "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) the 'character of the governmental action."' Building Owners, 254 F.3d at 99, n.13 (quoting Penn Central, 438 U.S. at 124); *see* also Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). In evaluating those factors, the analysis focuses on "the parcel as a whole" rather than just the portion of the property alleged to have been taken. Id. at 1483-84; see also Penn Central, 438 U.S. at 130-31.

First, in the context of a cable operator's entire system, the economic burden imposed by mandatory camage is minimal, because of the statutory cap, the existence of some voluntary carriage, and the rapid expansion in cable capacity. Indeed, the Court in the Turner cases relied on precisely these factors to reach the analogous conclusion that the 1992 Act imposed no unconstitutional burden on cable operators under the First Amendment.

Second, the must-carry requirements do not interfere with any "distinct investment backed expectations," a critical factor in the Penn Central analysis. Instead, these requirements simply constitute duties that a reasonable property owner would expect in a regulated industry. See e.g., General Tel. Co. of the Southwest v. United States, 449 F.2d 846, 864 (5th Cir. 1971) ("The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests."); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-28 (1992) (noting that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless"); United States v. Branch, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (noting that principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability "[b]ecause of the 'State's traditionally high degree of control of commercial dealings"') (quoting Lucas v. South Carolina Coastal Council, 505 U.S. at 1027). Indeed, carriage obligations of the sort at issue in the 1992 Cable Act have been a part of cable regulation from the beginning. See, e.g., United States v. Southwestern

Cable Co., 392 U.S. 157, 166-67 (1968) (mandatory carriage of certain broadcast signals); United States v. Midwest Video Corn., 406 U.S. 649, 653-55 (1972) (mandatory origination provisions); Black Hills Video Corn. v. FCC, 399 F.2d 65, 67 (8th Cir. 1968) (must cany **rules);** 47 U.S.C. § 531(b) **(PEG** provisions); 47 U.S.C. § 532(b)(1) (leased access provisions); see also **H.** Rep. No. 102-628, at 67 ("since signal carriage **rules** were central to regulation of cable television for many years, and most cable systems have continued to carry a number of local over-the-air signals, imposition of the signal carriage regulations would not disturb any reasonable expectations of investors in cable systems.").

Moreover, even in the absence of mandatory carriage rules, carrying local broadcast signals has been an expected – indeed, central – function of cable systems. No plausible argument can be maintained that rules **requiring** such carriage would result in **use** of the cable property that is inconsistent with reasonable investor expectations.

Third, **the** character of the governmental action precludes any argument of a taking under Penn Central. **As** the D.C. Circuit has observed, "the character **of** the governmental action depends both on whether the government has legitimized a physical occupation of **the** property, and whether the regulation has a legitimate public purpose. District Intown Properties Limited Partnership, 198 F.3d 874, 879 (D.C. Cir. 1999) (internal citations omitted). **Here,** as shown, there is no physical occupation of the property, and the Supreme Court in the Turner cases has affirmed that the must carry obligations have a legitimate public purpose. ***See.*** e.g., Turner I, 512 U.S. at 663 (noting